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## PPP Agreements


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Transaction Being Analyzed: Trans-Texas Corridor I-35 (TTC/35)

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### KEY ELEMENTS OF PUBLIC PRIVATE PARTNERSHIP ("PPP") AGREEMENTS

Last Updated: September 2005

No.	Key Element/Legal Issue:	Response/Suggested Model Provision:
1.	Type of PPP agreement:  a. Design-Build-Operate-Maintain b. Pre-Development Agreement c. Concession - Investor Financed d. Concession - Tax-exempt Financed e. Other _____	Pre-Development Agreement (in Texas, these are called "comprehensive development agreements").
2.	Agreement resulted from:  a. Unsolicited proposal and negotiations b. Competitive procurement following unsolicited proposal c. Competitive procurement d. Sole-source negotiations e. Other _____	Unsolicited proposal followed by negotiations.
3.	What is the title and date of the primary PPP agreement? Who are the parties to that agreement?  What is the form of the private entity (e.g., corporation, LLP, LLC, partnership or joint venture)? If a joint venture, is there joint and several liability?  Are the obligations of the private entity guaranteed by one or more third parties (other than sureties)?	Comprehensive Development Agreement, dated March 11, 2005. Parties: TxDOT and Cintra Zachry, LP (acting as the Developer).  Limited partnership.  There is a \$10 million guarantee from Cintra's parent corporation.
4.	Describe conditions applicable to the financing plan (types, sources, and covenants of capital financing).  Describe any public subsidy of revenues (e.g. shadow tolls, assumption of operation and maintenance costs).	Non-binding conceptual finance plan was submitted for the project and its individual facilities. It includes private equity.

5.	What other major ancillary agreements are there? Are other agreements contemplated to be executed in the future (e.g., such agreements might include a design-build contract, a concession agreement, a full or partial completion guaranty and/or financing agreements)?	Future agreements include (1) Facility Implementation Plans, which details the roles and responsibilities of TxDOT, the Developer and third parties for the work necessary to achieve a fixed scope, price and close of finance and (2) Facility Agreements, which govern development of the facility after the close of finance. Facility Agreements may be concession agreements, design-build agreements, design-build-operate-maintain or other forms.
6.	What are the roles of the public and private entities for pre-financing tasks, such as project definition, preparation of environmental documents, permitting, traffic and revenue studies, surveys, geotechnical investigations, right-of-way acquisition and preliminary engineering, public involvement?	To be negotiated in the Facility Implementation Plans.
7.	How is the private entity to be compensated for pre-financing costs (e.g., current reimbursement, reimbursement from financing proceeds, development fee, return-on-equity contribution)?	To be negotiated in the Facility Implementation Plans.
8.	How is the private entity to be compensated for its equity and debt contributions with respect to design, acquisition, permitting, construction, and related services?  How is the private entity to be compensated for operation and maintenance services?	To be set forth in the Facility Agreements, which may be procured or negotiated with Cintra Zachry or an affiliate.
9.	Is the public entity required to exercise its power of eminent domain to facilitate the transportation facility?	Not under the umbrella agreement. The parties will determine TxDOT's obligations in future ancillary agreements.
10.	Does the public entity establish the design, construction, operation and maintenance standards with which the private entity must comply?	Yes, although the Developer may request deviations from the minimum standards in the umbrella agreement.
11.	Describe any payment due from the private entity to the public entity for the grant of rights.	To be determined in future ancillary agreements on a facility-specific basis.
12.	What is the mechanism by which user fees, if any, are established and adjusted? Describe any limitations or user fees and exempt vehicles.	To be determined in future ancillary agreements on a facility-specific basis.
13.	Describe any revenue recovery between the public and private entities.	To be determined in future ancillary agreements on a facility-specific basis.
14.	What is the duration of the agreement and what are the options to extend this timeframe (if applicable)?	50 years. No options to extend.
15.	What are the major performance milestones that will be required of the parties, including the public entity and the private entity?	The comprehensive development agreement or umbrella agreement includes an initial planning effort. The Developer's compensation for that effort is \$3.5 million. The Developer will be responsible for providing the deliverables in accordance with milestones set forth in the project schedule.
16.	If applicable, describe the private entity's rights and obligations to provide future project capacity improvements, extras, or expansions.	To be determined in future ancillary agreements on a facility-specific basis.
17.	Who is responsible for the operation and maintenance of the completed facility?	To be determined in future ancillary agreements on a facility-specific basis.

18.	Describe any provisions relative to competitive transportation facilities (include a description of what constitute competitive facilities, exceptions, and measure of damages).	To be determined in future ancillary agreements on a facility-specific basis.
19.	Is the private entity required to reimburse the public entity for services? For design review? Permitting? Operation and maintenance? Policing?	To be determined in future ancillary agreements on a facility-specific basis.
20.	If applicable, what is the reasonable/ maximum return or rate of return on investment authorized for the developer/ operator to earn, the formula by which such rate of return will be calculated and the distribution of project revenues?	To be determined in future ancillary agreements on a facility-specific basis.
21.	What events constitute developer/operator defaults, and what are the major remedies available to the public owner?	<p>Summary of default events includes:</p> <ul style="list-style-type: none"> <li>• Breach of the agreement or any ancillary agreements, including failure to meet milestones;</li> <li>• Bankruptcy;</li> <li>• Revocation of parent guarantee;</li> <li>• Misrepresentation or fraud; and</li> <li>• Failure to pay claims.</li> </ul> <p>Following a default event, TxDOT may terminate the agreement or a portion thereof and is entitled to damages.</p>
22.	What other rights does the public entity have to terminate the agreement (e.g., failure to meet milestones, termination for convenience)? If the agreement is terminated for convenience, what compensation is paid to the private entity?	TxDOT retains the right to terminate for convenience. Compensation is limited to costs up to a cap as specified in the agreement.
23.	What events constitute public entity defaults, and what are the remedies available to the developer/operator?	Developer has the right to stop work if TxDOT fails to make a payment when due. Developer may terminate after 180 days of non-payment. Developer is entitled to rights under law in the event of a material breach of the agreement by TxDOT. Damages recoverable due to TxDOT default may not exceed the amount payable under a termination for convenience by TxDOT.
24.	What are the lender's rights and remedies with respect to private entity defaults? Does the agreement provide for lender's rights and remedies?	To be determined in future ancillary agreements on a facility-specific basis.
25.	What indemnification obligations do each of the parties have?	Developer must indemnify TxDOT against third-party claims due to the Developer's acts and omissions.
26.	What are the obligations of the developer/ operator to maintain records, to allow inspection and audit and to provide regular reports to the public owner?	Developer must retain records for 5 years after expiration or termination of the agreement. Developer must allow inspection and audit.
	What obligation does the public entity have to maintain the confidentiality of specified information?	Confidentiality of Developer's information is governed by the Public Records Act.

27.	<p>What are the conditions under which the private entity may assign its rights under the PPP agreement and/or its rights to the transportation facility?</p> <p>Does the PPP agreement contemplate a subsequent assignment of the private entity's rights to another entity, such as a non-profit corporation to be formed for the purpose of financing the project?</p> <p>Can it make an assignment for security?</p> <p>Can it transfer its rights and obligations to an affiliate or unrelated third party? What are the conditions, if any, to obtain the consent of the government entity?</p>	<p>Assignment requires TxDOT's prior approval.</p> <p>No.</p> <p>To be determined in ancillary agreements.</p> <p>Yes to an affiliate, with TxDOT's prior approval in its sole discretion and on a facility-by-facility basis.</p>
28.	What dispute resolution mechanisms are provided for?	Partnering, then statutory dispute resolution procedures.
29.	Describe any provisions limiting liability or waiving consequential damages.	<p>The comprehensive development agreement includes a limitation on liability of \$10 million plus any caps set forth in ancillary agreements. The cap does not include insurance proceeds, indemnities or losses due to fraud/gross negligence/intentional misconduct/illegal activities. The cap does not apply to Facility Agreements.</p> <p>The comprehensive development agreement includes a mutual waiver of consequential damages. The waiver does not apply to insurance proceeds, indemnities, losses due to fraud/gross negligence/intentional misconduct/illegal activities, liquidated damages or Facility Agreements.</p>

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